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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

NET TECH COMPUTER, INC.,

Cross-complainant and Appellant,

v.

DMAC REAL PROPERTY, INC.,

Cross-defendant and Respondent.

B230195

(Los Angeles County
Super. Ct. No. GC041253)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Edward C. Simpson, Judge. Affirmed.

Jackson Jenkins Renstrom, Gabriel A. Jackson, Stuart E. Supowit, Todd M. Thacker; Wood, Smith, Henning & Berman, Daniel A. Berman, Stacey F. Blank for Cross-complainant and Appellant.

Procter, Slaughter & Reagan, William M. Slaughter, Gabriele M. Lashly for Cross-defendant and Respondent.

Appellant, a computer services company, was sued for causing a fire that damaged several businesses in a shopping complex. It cross-claimed for indemnity against respondent, contending that respondent, as the property manager for the shopping complex, was liable for any damages.

The trial court granted summary judgment in favor of respondent, which we affirm. Respondent met its initial burden in moving for summary judgment by making a prima facie showing that it was not responsible for the fire. Since appellant failed to raise a triable issue of material fact in opposition, summary judgment was proper.

FACTUAL AND PROCEDURAL BACKGROUND

This case arose out of a fire that occurred in September 2007 in South Pasadena, which damaged commercial units at 1107-1115 Fair Oaks Avenue. At least five commercial tenants suffered economic damage from the fire. Their insurance companies, as subrogees, sued appellant Net Tech Computer, Inc. (Net Tech), alleging that the fire started as a result of a hazardous wiring condition above unit 1109, a unit occupied by Net Tech prior to the fire.

The complaint filed in August 2008 by National Fire Insurance Company of Hartford (as subrogee of unit 1113 tenant Fair Oaks Cleaners) described Net Tech's alleged negligence as follows: "In approximately July, 2007, [Net Tech] and DOES 1-50 occupied a space at a strip mall located at 1109 Fair Oaks Avenue Defendants . . . were in the process of leaving their rental space to move to another location, and in so doing removed a neon sign that was powered by a neon transformer located on an overhang/breezeway. Removal of the neon sign was done by improper means, e.g. attempting to close 'open' connections with electrical tape, leaving open electrical wire connections in a dangerous connection. [¶] On September 22, 2007, as a result of the open connections, water from rain entered the electrical wire through the improper tape, causing an arc, and a fire at the strip mall. The fire spread to other units in the area [¶] The fire and resulting damage was a direct consequence of Defendants . . . improperly removing their neon sign and leaving a high voltage electrical wire and

conduit travel path in a dangerous condition.” Each of the other complaints filed by the plaintiff insurers described Net Tech’s alleged negligence in substantially identical terms.

Net Tech filed a cross-complaint against DMAC Real Property, Inc. (DMAC) in November 2009 for implied indemnity, contribution, comparative fault, and declaratory relief. DMAC was the property management company for the shopping center where the fire occurred. Net Tech’s cross-complaint alleged that Net Tech “was in no way negligent, careless or reckless with respect to any act alleged in the [complaints against Net Tech]. If any unlawful conduct occurred as alleged . . . the acts of [DMAC] . . . constituted the sole and proximate cause of the injuries and damages on which the claim against [Net Tech] is predicated.”

DMAC moved for summary judgment in July 2010. Its motion rested on several different, though related, bases. DMAC presented evidence that the fire had two possible origins. First, the fire inspector for South Pasadena testified that the fire originated around a neon light transformer mounted within a mansard above unit 1113, a unit occupied by Fair Oaks Cleaners. Second, a private fire investigator, who was retained by an insurance company to investigate the fire, concluded that the fire originated in the storefront façade over the walkway of unit 1109, Net Tech’s former unit. In a declaration, the private fire investigator stated that the fire occurred due to the improper removal of a neon sign during Net Tech’s departure, which left the wiring and components exposed.

DMAC contended that there were no triable issues of fact that DMAC caused or contributed to the fire. If the fire originated above Fair Oaks Cleaners, Net Tech would not be liable for causing the fire and thus would have no indemnity claim against DMAC. If the fire originated above unit 1109, DMAC would not be liable because it was not involved in removing the neon sign and did not have a duty to inspect the premises for uncapped wires.

DMAC submitted evidence supporting each of its arguments. The evidence showed that Net Tech, pursuant to its lease, was responsible for removing its own signs from the property and that Net Tech actually did remove the neon sign. DMAC was not

involved in the removal of the neon sign. Its employee inspected unit 1109 following Net Tech's departure and observed that the neon sign had been removed from the mansard over the unit, but did not observe any exposed wiring. The mansard that held the neon sign and related wiring was accessible from the roof, and DMAC's employee did not have access to the roof. Furthermore, under the property management agreement between DMAC and the shopping center's owner, DMAC did not have a duty to inspect the property for fire hazards or exposed wires.

In its opposition, Net Tech did not present any evidence relating to DMAC's involvement with the fire. Indeed, other than submitting complaints that had already been filed with the court, Net Tech presented no evidence whatsoever. Instead, Net Tech argued that the facts relied on by DMAC in moving for summary judgment demonstrated that there were triable issues of fact. Net Tech contended that the language of the property management contract, which required DMAC to inspect the center at least two times per month and report any "major items" to the owner, made clear that DMAC assumed control and responsibility for the shopping center, including maintenance and repairs. Further, Net Tech argued that DMAC assumed control of unit 1109 after it was vacated by Net Tech in July 2007, and therefore DMAC should be held responsible for the September 2007 fire.

The motion for summary judgment was heard by the trial court on November 4, 2010. At the hearing, the trial court judge stated that DMAC owed a duty of care to the property's owner, not to Net Tech, and even if a duty of care existed, Net Tech failed to provide evidence that DMAC participated in the removal of the sign. (RT 5) The court found no duty "for the property manager DMAC to inspect the nature and the quality and workmanship of Net Tech's removal of the sign." The motion for summary judgment was therefore granted.

DISCUSSION

We review the trial court's decision on summary judgment de novo, determining independently whether the facts not subject to dispute support summary judgment. (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348.) Doubts are resolved in favor of the party

opposing the judgment, and we are not bound by the trial court's reasons for the summary judgment ruling. (*Conte v. Wyeth, Inc.* (2008) 168 Cal.App.4th 89, 97; *M.B. v. City of San Diego* (1991) 233 Cal.App.3d 699, 703-704; *Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 85.)

I. DMAC Met the Initial Burden of Production.

Net Tech's first argument on appeal is one that was not made in the trial court. Net Tech argues that DMAC, in moving for summary judgment, failed to produce evidence sufficient to shift the burden of proof to Net Tech. According to Net Tech, even if it had submitted no opposition, summary judgment would still be improper because DMAC did not satisfy the strict procedural requirements imposed by the summary judgment statute. We disagree.¹

Summary judgment must be granted if the papers show an absence of triable issues of material fact and that the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A defendant meets its initial burden on summary judgment by showing that one or more elements of the plaintiff's causes of action cannot be established, or that the causes of action are subject to a complete defense. (Code Civ. Proc., § 437c, subd. (p)(2).) The burden then shifts to the plaintiff to show a triable issue of fact as to the cause of action or defense. (*Ibid.*)

The scope of relevant issues on a summary judgment motion is determined by the pleadings. (*Nieto v. Blue Shield of California Life & Health Ins. Co.* (2010) 181 Cal.App.4th 60, 74.) Throughout the summary judgment process, the party moving for summary judgment generally bears the burden of persuasion that there is no triable issue of material fact and that summary judgment is proper as a matter of law. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*)). Further, the moving party bears an *initial* burden of production "to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a

¹ Accordingly, we do not determine if Net Tech waived this argument by not raising it in the trial court.

shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact.” (*Ibid.*) The manner in which a party carries its burden of persuasion and/or production depends on the applicable burden of proof at trial. (*Id.* at p. 851.) Thus, if a defendant moves for summary judgment against a plaintiff who would bear a preponderance of evidence burden of proof at trial, the defendant “must present evidence that would require a reasonable trier of fact *not* to find any underlying material fact more likely than not” (*Ibid.*, original italics.)

In granting the motion for summary judgment, the trial court found that DMAC met its initial burden of production, which Net Tech failed to adequately counter. On appeal, Net Tech argues that the “universe of tortious activity” encompassed by the pleadings was large, and, correspondingly, for DMAC to meet its initial burden, DMAC had to show that it was not responsible for any potential causes of the fire. According to Net Tech, “[t]here are many, many ways in which DMAC might be responsible for the fire which damaged the premises. It might have conducted an unreasonably negligent inspection of the premises which failed to discover the wiring issue when a reasonable inspection would have done so. DMAC might have allowed rodents or birds to take up residence in Unit 1109’s mansard, which subsequently caused the hazard by nibbling on wires. DMAC might have allowed kids to get up on the roof and damage the wiring.

This argument relies on an erroneous view of DMAC’s moving papers and the rules applicable to summary judgment. To recover on indemnity and related claims against DMAC, Net Tech would have had to establish that DMAC was at least partially responsible for the claims asserted against Net Tech. (See *AmeriGas Propane, L.P. v. Landstar Ranger, Inc.* (2010) 184 Cal.App.4th 981, 989-990; *Jocer Enterprises, Inc. v. Price* (2010) 183 Cal.App.4th 559, 573-574.) To prove negligence, a plaintiff must show that the defendant owed a duty of care, that the defendant breached the duty, and that the breach was a proximate or legal cause of the injury. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 772 (*Saelzler*).) The claims asserted by the various insurer plaintiffs against Net Tech were all based on the fire that damaged the commercial

tenants. Thus, DMAC could meet its initial burden on summary judgment by showing that it was not responsible for the fire.

DMAC did exactly this by producing evidence sufficient to show that there were two (and only two) possible causes of the fire, and that DMAC could not be held liable for either one. If the fire started over unit 1113, Net Tech would not be liable and would have no claim for indemnity against DMAC. DMAC also showed that if the fire began over unit 1109, there were no grounds for holding it responsible. Evidence was presented that the fire was caused by Net Tech's improper removal of the neon sign, which left wires and components exposed. DMAC was not involved with the removal of the sign, and its subsequent visual inspection did not reveal any exposed wiring. Furthermore, the sign was located in the mansard over the unit, an area that was not accessible to DMAC's employee (a fact that was not disputed by Net Tech in its responsive separate statement). The property management agreement contained no express provision that would require DMAC to search for fire hazards such as exposed wiring, particularly in the mansard. This evidence supported the conclusion that DMAC was not negligent, because it had no involvement in removing the sign and no obligation to discover the exposed wiring left by Net Tech.

DMAC directly attacked Net Tech's claim by showing that it did not owe and did not breach any alleged duty. Contrary to Net Tech's argument on appeal, DMAC did not undercut its own motion by moving for summary judgment in this manner. It is correct that a defendant moving for summary judgment is not required "to conclusively negate an element of the plaintiff's cause of action." (*Aguilar, supra*, 25 Cal. 4th at p. 853.) In line with relatively recent amendments to the summary judgment law, a defendant may now meet its initial burden by presenting evidence (often by way of discovery responses) that the plaintiff does not possess and cannot reasonably obtain evidence needed to establish an element of a claim. (*Id.* at pp. 854-855.) Just because a defendant has the option of choosing this potentially more efficient route, however, does not mean the defendant is barred from negating an element of the plaintiff's cause of action instead. (*Id.* at p. 853 [defendant "remains free to" conclusively negate any such element].)

By showing that there were two possible causes of the fire and it was not responsible for either, DMAC made a prima facie showing that no triable issue of material fact existed. (*See Aguilar, supra*, 25 Cal.4th at p. 851 [“A prima facie showing is one that is sufficient to support the position of the party in question. . . . No more is called for”].) DMAC met its initial burden, which was a burden of production, not persuasion. (See *id.* at p. 850 [“It would make little, if any, sense to allow for the shifting of a burden of persuasion. For if the moving party carries a burden of persuasion, the opposing party can do nothing other than concede”].) Net Tech still had the opportunity to respond to DMAC’s motion. Net Tech could have opposed the motion by presenting evidence of other possible causes of the fire implicating DMAC, or by showing that DMAC was involved with or responsible for the exposed wiring over unit 1109. But, as discussed further below, Net Tech did none of these things.

II. Summary Judgment Was Proper.

Once a defendant moving for summary judgment meets its initial burden, the burden then shifts to the plaintiff, who is “subjected to a burden of production of his own to make a prima facie showing of the existence of a genuine issue of material fact.” (*Aguilar, supra*, 25 Cal.4th at p. 845.) The plaintiff cannot satisfy this burden merely through speculation or conjecture, but instead must present admissible evidence raising a triable issue of fact. (*Crouse v. Brobeck, Phleger & Harrison* (1998) 67 Cal.App.4th 1509, 1524.) “[A] complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial. [Citation.]” (*Committee to Save the Beverly Highlands Homes Assn. v. Beverly Highlands Homes Assn.* (2001) 92 Cal.App.4th 1247, 1261.) Moreover, as we have previously held, “the opposition to summary judgment will be deemed insufficient when it is essentially conclusionary, argumentative or based on conjecture and speculation.” (*Wiz Technology, Inc. v. Coopers & Lybrand* (2003) 106 Cal.App.4th at 1, 11.)

Net Tech’s opposition to the motion for summary judgment was lacking. Net Tech submitted no evidence relevant to DMAC’s duties as property manager, the manner in which DMAC conducted or failed in its work, or DMAC’s involvement with the neon

sign and wiring above unit 1109. Instead, Net Tech argued that DMAC bore some responsibility for the fire because the property management contract required it to inspect the shopping center, and because Net Tech vacated unit 1109 approximately two months before the fire. Presented with this argument, the trial court reasonably found that DMAC owed Net Tech no duty. The management agreement did not require DMAC to inspect for exposed wiring, and Net Tech did not demonstrate how the agreement imposed a duty on DMAC toward Net Tech.

On appeal, Net Tech argues that DMAC breached its *general* duty of care to the commercial tenants by failing to prevent the fire, and that it is therefore liable for at least a portion of their damages based on the principle of comparative fault. Net Tech is correct that DMAC, like basically anyone else, owed a general duty of care. (Civ. Code, § 1714, subd. (a) [“Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself”].) If DMAC’s breach of this duty was a cause of the fire, then DMAC would be liable for negligence.

There are several fundamental problems with Net Tech’s argument, however. First, Net Tech does not explain how preventing the fire was a matter encompassed by DMAC’s general duty of care. “The existence of a duty is not an immutable fact of nature, but rather an expression of policy considerations providing legal protection. (*Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 472.) Thus, the existence and scope of a defendant's duty is a question for the court’s resolution. (*Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1004.)” (*Shin v. Ahn* (2007) 42 Cal.4th 482, 488-489.) “Some of the considerations that courts have employed in various contexts to determine the existence and scope of duty are: ‘the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the defendant’s conduct, the policy of preventing future harm, the extent of

the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved. [Citations.]” (*Parsons v. Crown Disposal Co.*, *supra*, 15 Cal. 4th at pp. 472-473.)

Net Tech did not attempt to show that these considerations supported the type of duty it seeks to impose on DMAC. For example, for DMAC to be liable for negligence, it would have to be shown that at the time of its negligent act or omission it was reasonably foreseeable that the act or omission could be a proximate cause of damage to another. (*Alva v. Cook* (1975) 49 Cal.App.3d 899, 903.) No evidence was presented that DMAC was aware or should have been aware of conditions that posed a risk for fire or similar damage. (Cf. *Edmondson Property Management v. Kwock* (2007) 156 Cal.App.4th 197, 202 [in which property manager knew that child played unsupervised on roof of shed but did not act to prevent her fall].)

The second problem with Net Tech’s theory that DMAC may have breached its general duty of care is that it is based on pure speculation. Once the burden shifted to Net Tech on summary judgment, Net Tech was required to present evidence raising a triable issue of fact, and it could not rely on mere speculation or conjecture. (*Crouse v. Brobeck, Phleger & Harrison*, *supra*, 67 Cal.App.4th at p. 1524.) Although we resolve doubts in favor of the party opposing summary judgment, we cannot draw inferences from thin air. (*Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 483.) A plaintiff must show that inferences favorable to its case are “*more reasonable or probable* than those against [it].” (*Ibid.*, original italics.) In its opening brief, Net Tech lists plenty of ways in which DMAC might have been negligent—it may have conducted an insufficient inspection, it may have allowed rodents or birds to chew on the wires, or it may have allowed unsupervised children to damage the wires. But there was no evidence that tended to show that any of these omissions actually occurred. DMAC submitted evidence showing that it was not responsible for the dangerous conditions that led to the fire. Net Tech’s bare response that various omissions were *possible* was not sufficient to avoid summary judgment. Unlike in *Beresford v. Pacific Gas & Elec. Co.* (1955) 45

Cal.2d 738, 745, a case relied on by Net Tech, in which the evidence showed that a fire could have been avoided if the defendant had sufficiently protected its power line, there was no evidence that DMAC breached a duty of care.

Third, Net Tech failed to show how any act or omission on the part of DMAC led to the fire. To demonstrate actual or legal causation, a plaintiff must show “that the defendant’s act or omission was a ‘substantial factor’ in bringing about the injury. [Citations.] In other words, plaintiff must show some substantial link or nexus between omission and injury.” (*Saelzler, supra*, 25 Cal.4th at p. 778.) A possibility of causation is not enough; if the chances are even that the defendant’s conduct caused any damage, the plaintiff cannot prevail. (*Id.* at pp. 775-776; *Leslie G. v. Perry & Associates, supra*, 43 Cal.App.4th at p. 484.) Having failed to show that DMAC committed any negligent act or omission, it almost goes without saying that Net Tech did not submit or point to any evidence of a substantial link between DMAC’s theoretical negligence and the fire. Rather, the evidence that was submitted showed that the fire (if it originated above unit 1109) was caused by Net Tech’s negligent removal of the neon sign.

Boiled down to its essence, Net Tech’s case rests on the unsupported contention that DMAC may have committed some act or omission that may have contributed to the fire. Given the inability of Net Tech to show that a genuine issue of material fact existed, the trial court was well justified in granting summary judgment to avoid a useless trial. (See *Saelzler, supra*, 25 Cal.4th at p. 768.)²

² Since we find that summary judgment was proper on these bases, we need not determine if summary judgment or adjudication was warranted by waiver clauses in certain tenant lease agreements.

DISPOSITION

The judgment is affirmed.

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BOREN, P.J.

We concur:

DOI TODD, J.

ASHMANN-GERST, J.